79-618

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79- .

GOOD HOPE REFINERIES, INC.,
PETITIONER,

v.

BELIA R. BENAVIDES, FLUMENCIO MUNOZ, EDNA AMADA M. LOZANO, LUIS ANTONIO MUNOZ AND OMAR ALBERTO MUNOZ,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Good Hope Refineries, Inc., petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the Court of Appeals, not yet officially reported, appears as Appendix A annexed hereto. That opinion

affirmed an unreported decision of the United States District Court for the District of Massachusetts (Appendix B). The District Court's decision affirmed an order of the Bankruptcy Court (Appendix C) dismissing the complaint, with prejudice, for lack of jurisdiction.

Jurisdiction.

The judgment of the Court of Appeals (Appendix A) was entered on July 17, 1979. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and § 24(c) of the Bankruptcy Act (hereinafter "the Act"), 11 U.S.C. § 47(c).

Question Presented.

Whether the First Circuit's decision, holding that the 60-day grace period provided by § 11(e) of the Act does not enlarge the time to exercise a contract option, is repugnant to fundamental bankruptcy policies of preserving assets for creditor distribution and debtor rehabilitation; promoting access to the release afforded by the Act and preventing detriment to a debtor on account of the filing of a petition.

Statutory Provisions Involved.

Sections 11(e), 70a, and 70b of the Act, 11 U.S.C. §§ 29(e), 110a and 110b, and § 108 of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 108, are set forth in Appendix D.

Statement of the Case.

On November 8, 1974, Good Hope Refineries, Inc. ("Refineries"), petitioner, entered into an oil and gas lease ("the Lease") with respondents ("Lessors"). The Lease was for a term of three years, in consideration for which Refineries made a "bonus" payment of more than $107,000. Under the terms of the Lease, Refineries as lessee was to begin drilling operations within one year, and, if drilling was not begun, the Lease terminated unless Refineries made a delay rental payment of $7,174.38 prior to the anniversary date of the Lease, November 8, 1975. On October 30, 1975, Refineries tendered a check for the delay rental. The next day Refineries filed a Chapter XI petition. Refineries' bank immediately set off an indebtedness against Refineries' deposits and dishonored the delay rental check when it was presented for collection. On November 18, 1975, Refineries tendered a cashier's check for the delay rentals which tender was refused.[1]

In March of 1976, Refineries filed a complaint in the Bankruptcy Court seeking to establish its continuing rights in the lease. After hearing argument, the Bankruptcy Court dismissed the complaint on the ground that the Lease had terminated automatically on November 8, 1975, and the Court therefore lacked jurisdiction. Refineries appealed to the District Court, which held that because the Lease was admittedly in existence on the date of the filing of the Chapter XI petition, the Bankruptcy Court had jurisdiction to determine whether Refineries had any rights in the Lease. The District Court went on to hold that under the applicable Texas law, the Lease terminated automatically upon Refineries' failure to make good tender of the delay rental and that nothing in the

[1] Refineries re-tender was made immediately subsequent to its learning of dishonor of its October 30, 1975 check.

Bankruptcy Act enabled the debtor-in-possession to cure such default.

The First Circuit affirmed, disagreeing with Refineries' contention that § 11(e) of the Act, 11 U.S.C. § 29(e), provided a 60-day extension of the time within which Refineries was permitted to tender payment to extend the Lease for another year.

Reasons for Granting the Writ.

The First Circuit's decision is founded on a narrow reading of § 11(e),[2] the pertinent portion of which provides:

> Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

[2]Section 11, which is set forth in Appendix D, is made applicable to Chapter XI proceedings by § 302 of the Act, 11 U.S.C. § 702.

Refineries contended that the effect of § 11(e) was to extend the time allowed for tender of its Lease extension payment to 60 days after the filing of its Chapter XI petition and that thus its tender on November 18, 1975 was timely. The First Circuit disagreed and held that § 11(e) did not enlarge Refineries' time to tender the delay rental payment.

The First Circuit decision rests primarily on the language of § 11(e). Appendix A, pp. 5-8. However, that language is admittedly ambiguous. The First Circuit itself stated that the words of § 11(e) were "not a model of clarity." Appendix A, p. 5. Similarly, Professor Countryman characterizes the language as "rather inscrutable."[3] Refineries' interpretation of § 11(e) is a permissible reading of the language of the statute. The statute allows a trustee or debtor-in-possession[4] 60 days to present any "demand, notice or the like." The question before the lower court was whether the ambiguous language, "the like," includes a payment of a comparatively nominal amount to extend for one year lease rights purchased for $107,000.

Collier's reading of § 11(e) supports Refineries' view:

> The last sentence in subdivision *e* is designed to apply where a period of limitation has been fixed by contract or where there is a time limit set for the doing of certain acts, such as the filing of pleadings or claims, and where such periods of time have not expired prior to the filing of

[3]Countryman, *Executory Contracts in Bankruptcy*, Part II, 58 Minn. L. Rev. 479, 507 (1974).

[4]Throughout this petition the terms "trustee" and "debtor" are used interchangeably. See § 342 of the Act, 11 U.S.C. § 742, which provides that where no trustee is appointed in a Chapter XI case, the debtor "shall have all the title and exercise all the powers of a trustee" appointed under the Act.

the petition in bankruptcy. It was thought that an extension of time should be given the receiver or trustee in such cases, as in cases affected by a state or federal statute of limitation, so that the receiver or trustee could take the necessary steps to preserve for the estate rights which might otherwise be barred.

1A Collier on Bankruptcy, ¶ 11.13 (1974) at 1223.

The First Circuit's error was to resolve the ambiguities of the language of § 11(e) without due regard for the policy of the Act as a whole and the legislative history of § 11(e) in particular. By doing so, it vitiated the integrated statutory scheme of the Act and impaired the protection of assets available to creditors and essential for debtor rehabilitation which Congress intended. The decision ignores the fundamental policies of the Act in three ways:

1. The First Circuit's interpretation of § 11(e) is inconsistent with § 70a, 11 U.S.C. 110a, which defines property of the estate, and § 70b, 11 U.S.C. 110b, which permits assumption or rejection of executory contracts;

2. The First Circuit's interpretation of § 11(e) is inconsistent with the legislative history; and

3. The First Circuit's interpretation of § 11(e) is antithetical to policies which the Act was designed to promote.

Section 11(e) was enacted in 1938 as part of the sweeping reform of the Act. Among other amendments, Congress also introduced a great number of changes in § 70a and substantially redefined what constitutes property of the estate; it broadened the categories of assets to which title vests in the trustee or debtor-in-possession, seeking to secure for creditors

everything of value the bankrupt or debtor possesses. Most importantly, it established the date of filing of the petition as the point upon which and from which all essential rights are determined.[5] The First Circuit's interpretation of § 11(e) establishes the contract termination date, here November 8, 1975, the anniversary date of the Lease, as the date determinative of the parties' rights. This is inconsistent with § 70a and violative of the rule that the date of filing the petition is the relevant date.

Section 70b of the Act,[6] a vital part of the 1938 legislation, granted a trustee 60 days within which to assume or reject executory contracts.[7] Both §§ 11(e) and 70b provide an identical 60-day grace period and were designed to work in tandem in order to achieve the common purpose of affording the trustee a

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[5] *Segal* v. *Rochelle*, 382 U.S. 375, 379 (1966).

Section 70a, 11 U.S.C. § 110a. "[T]he time of filing the petition has now been firmly established as the date of cleavage upon which the law operates to transform the debtor's property into assets available for administration and distribution in bankruptcy . . .." 4A Collier on Bankruptcy, 14th Edition, ¶ 70.03 (1967), p. 33.

Protections of estate assets similar to those provided in §§ 70a and 70b are contained in §§ 60 (preferences), 67d (fraudulent conveyances), 70c (rights of trustee as lien creditor), and 70e (rights of trustee as successor to creditors under state law) (respectively, 11 U.S.C. §§ 96, 107d, 110c and 110e).

[6] 11 U.S.C. § 110b.

[7] As orginally enacted, the 60 days began to run from the date of adjudication. A 1962 amendment, recognizing that trustees are sometimes not appointed for several weeks after adjudication, enlarged the period to 60 days from adjudication or 30 days after the trustee's qualification, whichever is later. See Bankruptcy Rules 607 and 11-53 and § 313(1) of the Act, 11 U.S.C. § 713.

The section also expressly permits the court to extend or reduce the time "for cause shown."

brief hiatus to examine and evaluate all his contractual rights.[8] Freezing the status of both the bankrupt/debtor and the non-bankrupt/debtor parties to any contract renders a protection similar to that of the automatic stay[9]: the status quo is maintained briefly in order to permit the trustee time to assess his

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[8]Countryman, *Executory Contracts in Bankruptcy*, Part II, 58 Minn. L. Rev. 479, 507 (1974) states:

> [I]f the trustee wishes to assume an executory contract, he should be able to cure a default in the contract unless the bankrupt's time for curing the default has expired. And a rather inscrutable provision in section 11e might be interpreted to mean that, if the time for cure has not expired at the filing of the bankruptcy petition, the trustee may in some cases have at least 60 days thereafter to cure the default.

In calling for clarification of the law relating to executory contracts, Countryman suggested:

> Amendments would be desirable also to make clear that the doctrine of anticipatory breach, other provisions of nonbankruptcy law and *express provisions in contracts and leases should not be available to enable the other contracting party to deprive the trustee of this option under the Bankruptcy Act to assume or reject executory contracts.* The trustee should also be given a reasonable time to cure prebankruptcy and postbankruptcy defaults without regard to whether the debtor has such a right under the contract or under nonbankruptcy law.

Id. p. 564 (emphasis added).

[9]Sections 11a, 113, 116, 148, 314, 414, 428 and 614 of the Act.

The House Report on the Bankruptcy Reform Act cogently summarized the existing automatic stay provisions:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment

position.[10] If the First Circuit's erroneous interpretation of § 11(e) is not overturned, an entire class of contractual rights will be lost to the estate. In every situation where the estate contains option rights, the trustee or debtor needs the 60 days provided by § 11(e) to assess the value of the option rights in light of the proceedings. Without such protection under § 11(e), valuable rights of the estate will expire before any remedial action can be taken.[11] In addition, a broadly remedial interpretation of § 11(e) is necessary to prevent loss of rights due to inadvertence, since "confusion and . . . inadequacy of records . . . usually attend the situation existing immediately before bankruptcy."[12] The First Circuit's interpretation of § 11(e) is thus inconsistent with all those provisions of the Act which operate to save for the estate the debtor's assets as of the date of the petition.

> or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> . . . . . .
>
> The stay is not permanent. . . . However, it is important that the trustee have an opportunity to inventory the debtor's position before proceeding with the administration of the case.

Report of the Committee on the Judiciary, House of Representatives, To Accompany H.R. 8200, H.R. REP. NO. 95-595, 95th Cong., 1st Sess. (1977) at 340-41. Congress intended § 11(e) to provide a similar breathing spell.

[10]As Professor MacLachlan stated, "it takes the receiver 60 days to find out where the toilet is." Creedon and Zinman, "Landlord's Bankruptcy: Laissez Les Lessees," 26 The Business Lawyer 1391, 1440 (1970).

[11]The situation to which § 11(e) is applicable is where, as in the instant case, the contract right was extant as of the date of the filing of the petition. Section 11(e) is not applicable to and does not revive a contract right or claim which expired *prior* to the filing of the petition.

[12]Report of the Commission on the Bankruptcy Laws of the United States (hereinafter "the Commission"), H.R. Doc. No. 93-137, 93d. Cong., 1st Sess., Pt. I (1973) p. 19.

It is manifest from the legislative history[13] that it was Congress's salutary purpose to preserve the assets available for the satisfaction of creditors' claims. In a Chapter XI proceeding, as in the instant case, where the financial rehabilitation of the debtor and preservation of assets essential for the formulation of a feasible plan of arrangement are the primary goals, these purposes are even more compelling. The First Circuit's interpretation of § 11(e) is inimical to this broad remedial purpose.

The First Circuit's reading of § 11(e) rests in part on the erroneous premise that Congress did not intend to alter the eco-

[13] Mr. Teitelbaum: [Section 11(e)] tolls the statute of limitations against a receiver or trustee and gives him a further opportunity to bring any action which the estate may have, which otherwise he may be debarred from bringing by reason of the operation of a Federal or State statute of limitations. It seemed to us that *the same extension should obtain not only where the bar is by virtue of a State or Federal statute but also where the bar is by virtue of some provision in an agreement.*

. . . . . .

Mr. Teitelbaum: [The 60-day extension] *gives the receiver or the trustees an opportunity to turn around for 60 days and see what the situation is and file the proof of loss within that period, even though, by virtue of the agreement, the time may have expired* a day or so after the petition in bankruptcy was filed.

. . . . . .

Mr. Chairman: [The provision] *fixes the status of the parties as it was at the time the estate came under the control of the bankruptcy court?*

Mr. Teitelbaum: *For the period of time prescribed in the section.* It tolls the statute for that period of time, in order to give an opportunity to the successor in interest, the receiver or trustee, to take appropriate action.

Proposed Amendments to the Bankruptcy Act: Hearings on H.R. 6439 before the House of Representatives; Committee on the Judiciary, 75th Congress, 33-35, June 2, 1937 (emphasis added).

nomic position and expectations of parties to a contract. Contrary to the rationale of *Schokbeton Industries, Inc.*, v. *Schokbeton Products Corp.*, 466 F. 2d 171 (5th Cir. 1972) to which the First Circuit subscribed, Congress expressly sanctioned the temporary suspension of the debtor's obligations under an executory contract while simultaneously holding the other party to the bargain.[14] The very purpose of the constitutional mandate to Congress under the Bankruptcy Clause[15] is to permit the subordination of private contract rights to the rehabilitory scheme of the Act for the good of the public as a whole. For this reason, the First Circuit's characterizing Refineries' interpretation of § 11(e) as anomalous is misplaced.[16] It should be noted that the broad equitable powers of the bankruptcy court may be invoked to protect a creditor who finds his legitimate interests endangered.[17]

The First Circuit decision is a barrier to the filing of a petition; it inhibits free access to the protection of the Act. Prospective bankrupts and debtors, cognizant of the First Circuit

[14] "Bankruptcy proceedings constantly modify and affect the property rights established by state law." *Wright* v. *Union Central L. Ins. Co.*, 304 U.S. 502, 517 (1938). See *e.g.*, *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734 (1931); *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U.S. 433 (1937).

[15] Article I, section 8 of the United States Constitution.

[16] "It would be anomalous indeed if section 11(e), a provision dealing mainly with suits and claims by the trustee, could be used to alter contractual rights substantially where time is of the essence and the debtor or trustee has defaulted. It would be even more anomalous if, in the case of an option contract, section 11(e) allowed the trustee to procure a right that never existed and for which no consideration has ever been paid, i.e., the right to exercise an option long after its termination date." (Appendix A, pp. 7-8.)

[17] Section 2 of the Act, 11 U.S.C. § 11; *Pepper* v. *Litton*, 308 U.S. 295 (1939). Such relief would be available to protect the interest of the seller of a ten-day option to purchase securities in the First Circuit's hypothetical (Appendix A, p. 6).

rule, are compelled to forestall seeking relief under the Act. They must wait until they are able to exercise all options to purchase, to renew leases and the like since the trustee will not be afforded any grace period. Even the slightest delay by a financially distressed company in instituting proceedings under the Act is dangerous. During a period of delay, creditors exploit remedies which they will no longer have when the petition is filed. Delay often precludes effective rehabilitation of the debtor.[18] In the aggregate, failures to expeditiously institute proceedings under the Act have a debilitating effect on the national economy.[19]

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[18] Conditions now prevailing in our modern industry and commerce render the prompt assembling of assets of paramount importance. While there may be instances where the attorney for the bankrupt properly instructs his client as to his obligations with regard to the assets of the estate until the trustee takes over, and the client takes all of the protective measures necessary for the safeguarding and preservation of the assets, this may be the exception rather than the rule. In most instances, however, this is not the case; and *unless some protective action is taken at once, unattended, abandoned assets may be jeopardized*. The assets may be spoiled, lost or stolen, thereby causing great loss to creditors which may prove to be irreparable or extremely difficult and costly to repair.

Proceedings of Third Seminar for Referees in Bankruptcy, Vol. III (1966), p. 39 (emphasis added). The foregoing discussion relates to the 1962 amendment to § 70a of the Act, 11 U.S.C. § 110a, but is probative of Refineries' interpretation of § 11(e).

[19] The Commission has encountered a generally prevalent opinion in the business community that *a major factor explaining the smallness of distributions in business bankruptcies is the delay in the institution of proceedings for liquidation until assets are largely depleted.*

. . . . . .

There should be no legal barrier to voluntary petitions.

. . . . . .

Initiating relief should not be a death knell. The process should encourage resort to it, by debtors and creditors, that cuts short the dissipation of assets and accumulation of debts. Belated commencement of a case may kill an opportunity for reorganization or arrangement.

The Commission Report, H.R. Doc. No. 93-137, 93d. Cong., 1st Sess., Pt. I (1973), p. 14, 75 (emphasis supplied).

The First Circuit's naive assertion that "[T]he simple answer to any apparent harshness of the result in this case is that a prudent man who plans to file a Chapter XI petition tomorrow uses a cashier's check to make an important payment today" ignores fundamental considerations. First, debtors must often institute bankruptcy proceeding in haste — without the time for leisurely planning. Second, there is usually a hiatus after the filing of a petition and before the trustee qualifies or the debtor is authorized to conduct its business, during which no one can act for the estate. Third, a trustee in bankruptcy may not even qualify until after the contract right has expired. Finally, no entity can protect its assets from forfeiture if an involuntary petition is filed against it.[20]

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[20] The following example illustrates this:

> In 1970 ABC Company and XYZ Company enter into a lease financing agreement for a costly knitting machine having a useful life of 15 years. The agreement provides that ABC shall pay monthly rentals for 8 years and that ABC has an option to purchase the machine, which must be exercised on or before December 31, 1977, for a comparatively nominal amount. If ABC fails to exercise, XYZ may sell the machine to another party. On December 15, 1977, an involuntary petition is filed against ABC. ABC's trustee qualifies on January 5, 1978.

Under the First Circuit's rule, XYZ is free to sell the machine as of January 1, 1978 and ABC's trustee has no rights in the machine, those rights having automatically expired under the lease terms on December 31, 1977. It is immediately apparent that there is nothing which ABC or ABC's trustee could do to prevent this forfeiture. Both are utterly powerless to protect the estate's valuable asset. XYZ, however, reaps a windfall since it can now either elect

The inevitable result of the First Circuit's interpretation of § 11(e) is to permit the non-debtor contracting party to abuse the Act in order to gain valuable contract rights of the debtor. The non-debtor party to the contract reaps a windfall, just as the Lessors in this case did. This result is inimical to Congress's desire to prevent detriment to a debtor on account of his filing a petition.

Finally, this Court should grant certiorari because the lower court decision entailed the first judicial pronouncement on § 108(b)[21] of the Bankruptcy Reform Act of 1978, which gov-

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to sell the knitting machine to a third party at a price substantially better than the one provided in the agreement or waive ABC's failure to exercise its option. The better rule would afford ABC's trustee 60 days from December 15, 1977 to determine whether or not to exercise the option. Only given such a brief respite, will he be able to make an educated assessment of the situation. XYZ's interests will not be endangered; if it feels they are, it may make application to the bankruptcy court to shorten the time.

[21] That the purpose of § 108(b), set forth in Appendix D, is identical to that of § 11(e) is demonstrated by the legislative history:

> Subsections (a) and (b) [of Section 108], derived from Bankruptcy Act Section 11, permit the trustee, when he steps into the shoes of the debtor, an extension of time for filing an action or doing some other act that is required to preserve the debtor's rights.

Report of the Committee on the Judiciary, United States Senate, to Accompany S.2266, S. REP. NO. 95-989, 95th Cong., 2d Sess. 30 (1978). Compare in this regard the legislative history of § 541 of the Bankruptcy Reform Act, which defines property of the estate and parallels § 70a of the Act:

> "[Section 541] is not intended to expand the debtor's rights against others more than they exist at the commencement of the case. For example, if the debtor has a claim that is barred at the time of the commencement of the case by the statute of limitations, then the trustee would not be able to pursue that claim, because he too would be barred. He could take no greater rights than the debtor himself had. But *see* proposed 11 U.S.C. 108, which would permit the trustee a tolling of the statute of limitations if it had not run before the date of the filing of the petition."

Report of the Committee on the Judiciary, House of Representatives, to Accompany H.R. 8200, H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 367-68 (1977).

erns cases filed on or after October 1, 1979. Appendix A, p. 8. Even though the § 11(e) problem arose under the Act, the decision below makes it clear that the First Circuit's erroneous interpretation of § 11(e), will live on and will disrupt the statutory framework of the new Act in precisely the same manner, with identical adverse repercussions.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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Dated: October 15, 1979.

Appendix A.

United States Court of Appeals
For the First Circuit

No. 79-1134

GOOD HOPE REFINERIES, INC.,

PLAINTIFF, APPELLANT,

v.

BELIA R. BENAVIDES, et al.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK J. MURRAY, *Senior District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*

Stephen F. Gordon, with whom *Carol J. Kenner*, and *Widett, Widett, Slater & Goldman, P.C.*, were on brief, for appellant.

Wayne H. Eisenhauer, with whom *John E. Mann*, and *Mann, Freed, Kazen & Hansen*, were on brief, for appellees.

July 17, 1979

COFFIN, *Chief Judge*. This is an appeal in a proceeding under Chapter XI of the Bankruptcy Act from a district court's dismissal of a complaint seeking to establish rights under an oil and gas lease. We affirm.

The facts giving rise to this appeal are fairly simple. On November 8, 1974, appellant refining company entered into an oil and gas lease with appellees. Under the terms of the lease, appellant as lessee was to begin drilling operations within one year, and, if drilling was not begun, the lease automatically terminated unless appellant paid a delay rental prior to the anniversary date of the lease. On October 30, 1975, appellant tendered a check for the delay rental. The next day, appellant filed a Chapter XI petition. Appellant's bank immediately set off against appellant's deposits and dishonored the delay rental check when it was presented for collection.

On November 18, 1975, appellant tendered a cashier's check for the delay rentals, which tender was refused as untimely.

In March of 1976, appellant filed a complaint in the bankruptcy court seeking to establish its continuing rights in the lease. After hearing argument, the bankruptcy court dismissed the complaint on the ground that the lease had terminated automatically on November 8, 1975, and the court therefore lacked jurisdiction.[1] Appellant appealed to the district court, which held that because the lease was admittedly in existence on the date of filing of the Chapter XI petition, the bankruptcy court had jurisdiction to determine whether appellant had any continuing rights in the lease. The district court went on to hold that under the Texas law applicable to this case[2] the lease terminated automatically upon failure to make good tender of delay rental and that nothing in the Bankruptcy Act enabled the debtor-in-possession to cure such failure. We agree.

As an initial matter, appellant argues that the district court erred in reaching the merits of the dispute after deciding that the bankruptcy court did have jurisdiction to determine the rights involved. This argument breaks down into two contentions, that some as yet unspecified factual allegations remain to be proven to the fact finder and that appellant was unfairly surprised because it had no opportunity to argue the merits of the Texas law involved. As far as facts are concerned, appellant's complaint sets forth such information that "it appears to a certainty that the Plaintiff is entitled to no relief under any

[1] As the district court noted, the grounds for the bankruptcy court's decision were somewhat unclear. Appellees had argued both that the court lacked jurisdiction because the asset involved had evaporated and that appellant's complaint should be dismissed on the merits because neither Texas law nor the bankruptcy act enabled the debtor-in-possession to revive a moribund mineral lease. The bankruptcy court's "jurisdictional" decision was based on a ground that could also support a decision on the merits, i.e., that the debtor had no rights in the lease.

[2] The land and minerals involved are situated in Texas and the parties agree that Texas law provides the initial ground rules for determining the extent of appellant's property interests in the lease.

statement of facts which could be proved in support of the complaint." *Ballou* v. *General Electric Co.*, 393 F.2d 398, 400 (1st Cir. 1968). Appellant had ample opportunity to amend its pleadings before the bankruptcy court and failed to do so. More important, in both the district court and in this court, appellant failed to mention any relevant facts that might be added to the complaint, preferring instead to rely upon the general assertion that it is entitled to be heard on the facts. Such a bald demand, without more, is simply not enough when the facts alleged in the complaint affirmatively preclude relief.

As for opportunity to be heard on the merits, we note that appellees' original motion in the bankruptcy court both challenged that court's jurisdiction and moved to dismiss for failure to state a claim. Both arguments revolved around the same issues of Texas law. In the district court, appellees again argued that state law had terminated all of appellant's rights. This procedural posture put appellant on clear notice that the merits, as well as the jurisdictional question, were in issue. Finally, even if appellant were surprised by a decision on the merits in the district court, it has had ample opportunity to argue Texas law to this court. Even if appellant were excused from raising legal arguments below because of the unusual procedural history of this case, there is no excuse for not putting its legal cards on the table at this point. *Cf. Slotnick* v. *Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977) (court of appeals will affirm dismissal entered on erroneous ground if record reveals suit is without merit).

Turning to the merits, Texas law leaves no room for doubt about the effect of failure to make good tender of delay rentals. The form of conveyance used here is commonly called an "unless" lease. If the lessee fails to drill, his rights in the lease automatically terminate unless timely payment of delay rentals is made. The Texas courts characterize the conveyance as creating a determinable fee interest in the minerals in place, which interest reverts automatically to the grantor upon

failure to drill or pay. *W.T. Waggoner Estate* v. *Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27, 28 (1929); *Waggoner & Zeller Oil Co.* v. *Deike*, 508 S.W.2d 163 (Tex. Ct. App. 1974). Tender of a bad check is not sufficient tender to forestall the reverter. *Nelson Bunker Hunt Trust Estate* v. *Jarmon*, 345 S.W.2d 579, 581 (Tex. Ct. App. 1961). This rule applies even if the lessor knows that the delay rental check has been dishonored prior to the anniversary date of the lease and fails to inform the lessee. *Id.* Thus, if appellant has any continuing rights in the oil and gas lease, such rights must spring from some change that federal bankruptcy law imposes upon normal Texas property rules.

Appellant argues that section 11(e) of the Bankruptcy Act, 11 U.S.C. § 29(e), changes the result that would be reached under Texas law. The first sentence of that section sets a two year statute of limitations for suits by a trustee and is concededly not applicable here. The second sentence provides a special 60 day period for the trustee (or debtor-in-possession) to perfect certain rights of the debtor, as follows:

> "Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be."

Appellant argues that the statutory language allowing the trustee to "take any . . . action or do any act" necessary to preserve the debtor's rights within 60 days of adjudication allowed appellant to make the delay rental payment within 60 days of the date of filing of the Chapter XI petition. If this argument is correct, then appellant's tender of delay rentals on November 18, 1975, preserved its rights in the lease.

The parties agree that the act appellant sought to perform within the 60 day period may be fairly analogized to exercising an option to extend an option to purchase property. There is precedent for so viewing the function of a delay rental payment. *Empire Gas & Fuel Co.* v. *Saunders*, 22 F.2d 733 (5th Cir. 1927), *cert. dismissed*, 278 U.S. 581 (1928). Thus, appellant would have us read section 11(e) as providing an automatic extension of an option contract for a period of up to 60 days from the date of adjudication. We cannot do so.

Although not a model of clarity, we think the statute can only be read as affecting two separate types of limitations derived from two different sources, both types being extended for 60 days upon filing. First, there are "period[s] of limitation" created "by an agreement". Such periods are extended only if they set a limit on the time available "for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, *or the like* . . . ." (Emphasis added.) Second, there is a broader category of types of limitations, giving the trustee an extra 60 days "for taking any action, filing any claim or pleading, or doing any act . . . ." This broader category of limitations extended by section 11(e) only comes into play, however, "where in any *proceeding*, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law . . . ."[3] (Emphasis added.) The instant case does not involve

[3] We think this reading the only logical parsing of the admittedly complex sentence involved. The key to the logical breaks in the sentence is the use of the word "where". As we read it, the sentence can be simplified as follows: "*Where* an agreement limits the time to

any "proceeding". Rather, if the time limit on appellant's option to drill can be viewed as a "period of limitation" at all, it is a limitation created by agreement.

By its language section 11(e) only expands consensual limitations if they involve "the like" of presenting proof of claim, proof of loss, demand, or notice. We do not think that making a payment to extend or exercise an option is akin to making a claim against an insurance policy or surety bond. *Cf. Goosen* v. *Indemnity Ins. Co. of North America*, 234 F.2d 463 (6th Cir. 1956) (section 11(e) applies to extend period to file notice of claim on bond). In the case of a payment to extend an option, the debtor is obliged to tender a certain performance, which performance is the consideration for the extension, by a certain time, and time is expressly of the essence. In the case of a notice to an insurance company, the debtor must comply with a condition precedent on the company's obligation to perform, which condition is not in the nature of the concurrent condition of consideration supporting the bargain, but rather is a condition protecting the insurance company from stale and possibly fraudulent claims. Two examples make this theoretical distinction concrete: an insurance company would not be unfairly surprised or prejudiced if a 60 day notice of claim provision were extended by operation of law to 120 days, but the seller of a ten day option to purchase securities would find his expectations, and his economic position, radically altered if the option were suddenly extended to 70 days.

The Fifth Circuit applied a similar rationale in *Schokbeton Indus. Inc.* v. *Schokbeton Products Corp.*, 466 F.2d 171 (5th Cir. 1971). The debtor Products was an exclusive licensee of Industries. Products defaulted on royalty payments. Pursuant to the licensing agreement, Industries demanded cure within

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make a claim against the promisor, *or where* the rules of a proceeding limit the time for taking a procedural step in that proceeding, *and where* such a time limit has not expired at the time of filing, the trustee has a minimum of 60 days from filing to make a claim or take a procedural step."

60 days, on pain of termination of the licensing agreement. Products then filed a Chapter XI petition. When the 60 days allowed under the contract to cure a default had expired, Industries sent Products a notice of termination. Four months later, Products sued in bankruptcy court to establish the vitality of the licensing agreement and arrange a schedule of payment of overdue royalties. Without considering the fact that Products had not cured its default within the 60 day period provided by section 11(e), the Fifth Circuit held that section 11(e) "provides no basis for suspending the debtor's obligations under an executory contract while simultaneously holding the other party to the bargain." *Id.* at 176.

We agree with appellant that *Schokbeton* is distinguishable on its facts; the 60 day period under 11(e) had long since expired when the debtor tried to cure its default. Moreover, we think the *Schokbeton* court's holding a bit overbroad. Technically, a debtor's obligation to inform an insurance company of a claim *is* suspended by section 11(e) while the company is simultaneously held to the bargain. Nevertheless, we think the basic rationale of *Schokbeton* supports our refusal to apply section 11(e) to extend option contracts. The *Schokbeton* court pointed out that when a trustee exercises his power under section 70(b), 11 U.S.C. § 110(b), to assume an executory contract, the trustee obtains only such contractual rights as the debtor had and assumes all burdens to which the debtor was subject. *Id.* at 175 (and cases cited therein). If the debtor has committed, or the trustee commits, an incurable breach, the trustee has no continuing rights under the contract. *Cf. Matter of Gulfco Investment Corp.*, 520 F.2d 741 (10th Cir. 1975) (trustee allowed a "reasonable" time to decide whether or not to adopt installment purchase contract; reasonable time may exceed contractual deadline for installment payment if large equity involved and contract complex). It would be anomalous indeed if section 11(e), a provision dealing mainly with suits and claims by the trustee, could be used to alter contractual rights substantially where time is of the

essence and the debtor or the trustee has defaulted. It would be even more anomalous if, in the case of an option contract, section 11(e) allowed the trustee to procure a right that never existed and for which no consideration has ever been paid, i.e., the right to exercise an option long after its termination date.

We think the preceding discussion also disposes of appellant's arguments based upon the Bankruptcy Reform Act of 1978, P.L. No. 95-598, 92 Stat. 2549. Section 108(b) of the Reform Act replaces the old section 11(e) and adds to the various acts permitted within the 60 day period a power to "cure a default". 92 Stat. 2556. Citing inconclusive legislative history, appellant argues that section 108 was meant to recodify section 11(e) and thus should influence our reading of the old Act. Assuming *arguendo* that the new Act in any way reflects upon the old, we do not think the new section 108(b) helps appellant. When a debtor or a trustee fails to exercise or renew an option by paying the agreed price, there is no contractual "default" to be cured. The rights that the debtor purchased for the price of the option have merely expired of their own terms. There is no obligation to exercise or extend such an option, and thus no default when further payment is not made. Appellant has cited no case supporting its contrary reading of section 11(e), and no language in the statute nor reason of policy justifies such a reading. We must reject appellant's position.

Finally, we have considered appellant's extensive, if vague arguments that the bankruptcy court should be allowed to consider the inequities involved here and exercise its equitable jurisdiction to remedy the situation. The law is settled, however, that "unless" leases are true option contracts in the sense that failure to drill or pay does not work a forfeiture. *See Empire Gas & Fuel Co.* v. *Saunders*, *supra*. The simple answer to any apparent harshness of the result in this case is

that a prudent man who plans to file a Chapter XI petition tomorrow uses a cashier's check to make an important payment today.

Affirmed.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GOOD HOPE REFINERIES, INC., Appellant

v. Bk. No. 75-2741-M

BELIA R. BENAVIDES ET AL., Appellees

Memorandum

MURRAY, Senior District Judge

Good Hope Refineries, Inc. (Good Hope), has appealed from the order of the bankruptcy judge dismissing its complaint to establish rights under a lease agreement entered into by appellees, as lessors, and Good Hope, as lessee. The ultimate relief sought by the complaint is a determination that the lease agreement is validly existing and in force and effect.

The lease was executed on November 8, 1974 and granted to Good Hope exclusive rights to conduct drilling operations on the leased premises in Laredo, Texas, necessary for oil and gas production. The lease was in full force and effect on October 31, 1975 when Good Hope filed a petition under Chapter XI of the Bankruptcy Act. The bankruptcy court by order continued Good Hope in possession of its properties to operate its business. On or before November 8, 1975, the first anniversary of the execution of the lease, Good Hope tendered a check for $7174.38 to the Union National Bank of Laredo to the credit of the appellees. The check was returned by the bank for insufficient funds, because on or about November 3, as a result of the Chapter XI filing, the bank had offset all funds

then on deposit in Good Hope's account. Immediately after receiving notice of dishonor on or about November 18, Good Hope tendered in hand a bank cashier's check to Belia R. Benavides, one of the appellees, who refused to accept it. All appellees[1] have concurred in the refusal to accept tender, and have declared their intention to consider the lease terminated.

The bankruptcy court initially issued a preliminary injunction to enjoin defendant/appellees from dispossessing Good Hope of the leasehold interest, and later granted defendant/appellees' motion to dismiss[2] the complaint with prejudice. This appeal followed.

Although the precise ground of the order of dismissal[3] does not clearly appear, if the record justifies dismissal with preju-

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[1] The other appellees are Flumencio Munoz, Edna Amada M. Lozano, Luis Antonio Munoz, and Omar Alberto Munoz.

[2] Defendants' motion stated as grounds, *inter alia*:

> 1. That this Court has no jurisdiction since the terminated leasehold interest is not an asset of the bankruptcy estate since the lease terminated by its own terms on November 8, 1975.
>
> . . . . . .
>
> 3. That Defendants are entitled to judgment as a matter of law since the Complaint fails to state a cause of action against those Defendants.

[3] The bankruptcy judge's order read as follows:

> Upon consideration of the Motion to Dismiss Complaint to Establish Rights Under Lease, it appearing to the Court that the Motion should be granted, and that this court has no jurisdiction or control of the asset involved, being an oil and gas lease that terminated by the terms thereof on November 8, 1975, it is by the Court this 9th day of June, 1976.
>
> ORDERED, that the Complaint to Establish Rights Under Lease be, and the same is hereby, dismissed with prejudice, and
>
> FURTHER ORDERED, that the Preliminary Injunction issued in this matter on April 8, 1976 be and the same is hereby, dissolved and vacated.

dice this court may properly affirm even though the bankruptcy judge may have relied upon an incorrect ground. *See Local Division No. 714 v. Greater Portland Transit District*, slip op. at 20 (1st Cir., November 15, 1978). The subject matter of the complaint is within the jurisdiction of the bankruptcy court and this court on appeal. The motion to dismiss addressed the merits of Good Hope's claim presented by the complaint, and the parties argued and briefed the sufficiency of the complaint in the court below and in this court. *See also* Appellant's Statement of Issues on Appeal. The factual record consists only of undisputed facts, and affirmance, if granted, would not intrude upon the discretion, expertise or fact-finding function of the bankruptcy court. On such a record the bankruptcy court is in no better position than is this court to determine whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief". *Conley v. Gibson*, 355 U.S. 41, 45-46 (1975). Appellees argue that no legal or equitable grounds exist to revive the oil and gas lease that terminated by its own terms. However, appellant contends that there are three theories which support the complaint: (1) exceptions may exist to the general principles of Texas law, (2) section 11e [11 U.S.C. § 29(e)] of the Bankruptcy Act provides for an enlargement of time to tender the delay rental, and (3) the complaint is sufficient to invoke the equity power of the bankruptcy court to enjoin forfeiture of the lease. The court will address them.

I

The parties are in agreement that the law of Texas, where the land is situated, is well settled with respect to the issues presented in the case, and the court will apply the applicable Texas law.

The oil and gas lease incorporated in the complaint contains a so-called "unless clause"[4] which provides for automatic termination of the lease unless lessee commences drilling operations or pays a specified sum (delay rental) on or before the first anniversary of the execution of the lease. Such an instrument is a lease in name only; it is more like the grant of a determinable fee. *See* Walker, "The Nature of Property Interests Created by an Oil and Gas Lease in Texas", 7 Tex. L. Rev. 539 (1929). The "unless clause" operates as a common law limitation upon the lessee's interest. *W. T. Waggoner Estate v. Sigler Oil Co.*, 19 S.W. 2d 27 (Tex. 1929); *Colby v. Sun Oil Co.*, 288 S.W. 2d 221 (Tex. Civ. App. 1956), *writ refused n.r.e.* Because no obligation exists on the part of the lessee to drill or pay the delay rental, neither party has a cause of action where the lessee fails to drill or pay. *See Waggoner & Zeller Oil Co. v. Deike*, 508 S.W. 2d 163 (Tex. Civ. App. 1974), *writ refused n.r.e.*; 2 Summers, *The Law of Oil and Gas*, §§ 339, 452 (2d ed. 1958). Indeed, the lessor need take no judicial or

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[4]The lease provision, relevant to this appeal appears in Clause IV and reads, in part, as follows:

> If operations for drilling are not commenced on said land on or before One (1) year from the date hereof, this lease shall then terminate as to both parties, unless on or before such anniversary date, Lessee shall pay or tender to Lessor or to credit of Lessor in the Union National Bank of Laredo, at Laredo, Texas, (which bank and its successors are Lessor's agent and shall continue as the depository for all the rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of Seven Thousand One Hundred Seventy-Four and 38/100ths ($7,178.38) Dollars, herein call rental, which will cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner, the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term by the payment of such delay rentals. The payment or tender of rental may be made by the check or draft of Lessee delivered to Lessor or to said bank on or before said date of payment. . . .

other formal action in order to claim his reversion in the land if the lessee fails to drill or pay by the anniversary date. *Humble Oil & Refining Co. v. Davis*, 296 S.W. 285 (Tex. Comm. App. 1927); *W. T. Waggoner Estate v. Sigler Oil Co., supra*; Summers, *supra* § 337.

There are no allegations to support any claim that drilling operations had occurred. Further, the complaint fails to show that appellant's tender was effective. There is no allegation of any agreement by the bank to honor the check despite insufficiency of funds. *See Hamilton v. Baker*, 214 S.W. 2d 460 (Tex. 1948). The complaint shows that appellant's own action in filing the Chapter XI petition caused the check to be returned. It is "well settled that where a check is tendered in payment of delay rentals under an 'unless' lease, if the lease is to be perfected, the check must in fact be good". *Nelson Bunker Hunt Trust Estate v. Jake Jarmon*, 345 S.W. 2d 579, 581 (Tex. Civ. App. 1961), *writ refused*. Here the bank acted predictably in setting off the funds in appellant's account, particularly where inaction could have caused the bank to lose any setoff rights it had. *See In Re Applied Logic Corp.*, 576 F.2d 952 (2d Cir. 1978); *Farmers Bank of Clinton v. Julian*, 383 F.2d 314 (8th Cir.), *cert. denied* 389 U.S. 1021 (1967); *First National Bank in Fort Lauderdale v. Davis*, 317 F.2d 770 (5th Cir. 1963); *In re Williams*, 422 F. Supp. 342, 345 (N.D. Ga. 1976); 9 Collier, Bankruptcy ¶ 7.10 at 57-58 n.11. *But cf. Baker v. Gold Seal Liquors*, 417 U.S. 467 (1974); *Ben Hyman & Co., Inc. v. Fulton National Bank*, 423 F. Supp. 1006 (N.D. Ga. 1976), *appeal dismissed* 577 F.2d 966 (5th Cir. 1978). The check was not good, and the record will not support a valid argument by appellant that only circumstances beyond its control caused return of the check. No case holds that Texas law will excuse late tender in the circumstances shown here.

There are no allegations in the complaint which would support any exceptions to Texas law on the payment of delay rental. *See generally* Williams and Meyers, *The Law of Oil and Gas*, § 606.6. There are no allegations giving rise to an estoppel. *Compare Humble Oil & Refining Co. v. Harrison*, 205 S.W. 2d 355 (Tex. 1947). Tender of the cashier's check, being untimely, could not prevent termination of the lease; strict adherence to the deadline for payment of the delay rental is required. Williams and Meyers, *supra* § 606.2. Good Hope's complete failure to allege any facts that would support a claim that drilling on the land had occurred, or would excuse failure to make proper tender, constitutes a glaring omission in the complaint. The omission is so significant that, if the facts "existed, [they] would clearly dominate the case", making it "fair to assume that those facts do not exist". *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976). The complaint presents no case for relief under Texas law.

II

Proceedings under Chapter XI incorporate, except where inconsistent, principles applicable to bankruptcy proceedings. 11 U.S.C. § 702. However, there is no merit to appellant's contention that Section 11e of the Bankruptcy Act [11 U.S.C. § 29(e)] permits enlargement of the time to tender the delay rental. Neither the language of section 11e nor its proper application absolves appellant from its agreement to suffer termination of the lease. Neither does section 11e operate to resurrect for appellant the opportunity afforded by the lease which was never seized. *In Schokbeton Industries, Inc. v. Schokbeton Products Corporation*, 466 F.2d 171, 176 (5th Cir. 1972), the court, dealing with section 11e in a Chapter XI case, pointed out:

> Obviously that statute permits a trustee, receiver or debtor in possession to avoid a statutory (and perhaps a contractual) time limitation that would otherwise bar a claim *asserted on behalf of the debtor*. [Citations omitted.] It provides no basis for suspending the debtor's obligations under an executory contract while simultaneously holding the other party to the bargain. [Italics in original.] [Footnotes omitted.]

The court is not persuaded by appellant's argument that unilateral postponement of the contractual termination provision of the lease is permitted by section 11e or the Chapter XI proceedings.

III

The complaint does not set forth a case for relief from the operation of the termination clause within the equity jurisdiction of the bankruptcy court. Undoubtedly that court possesses equitable powers to prevent a forfeiture that threatens a Chapter XI arrangement. *Queens Boulevard Wine & Liquor Corp. v. Blum*, 503 F.2d 202 (2d Cir. 1974); *Matter of M & M Transportation Company*, 437 F. Supp. 821 (S.D. N.Y. 1977). These cases are clearly distinguishable from the instant case.[5] The nature of the lease agreement before the court and appellant's failure to extend its rights under it precluded the occur-

[5]These cases are clearly distinguishable from the instant appeal in three significant respects. Neither case involved an oil and gas lease, which is a lease in name only. Unlike Good Hope, the debtors had physical possession of the leased land or equipment so that enjoining a forfeiture helped preserve the *status quo* pending an arrangement. Finally, both cases involved covenants, not special limitations upon an estate imposing no obligations on the lessee and making time of the essence.

rence of a forfeiture that would threaten a potential arrangement. *See* Walker, *supra* at 8 Texas L. Rev. 483, 528-29 (1930). The parties made time of the essence of the opportunity afforded appellant, who was under no obligation to act. *See* Summers, *supra* § 452, 117-126. 27 Am. Jur. 2d, Equity § 30. It is apparent from the nature of the lease agreement that the delay rental was not the essential object of the parties and termination only an incident intended to secure the payment. *Gillespie v. Bobo*, 271 F. 641, 643-44 (5th Cir. 1921). *See also Mattison v. Trotti*, 262 F.2d 339, 342 (5th Cir. 1959). Termination of the lease did not operate to divest appellant of any interest in the land or any vested right. Appellant had not invested any money or industry in the premises, and it did not stand to lose by the termination anything that it had previously acquired. The lease agreement from its inception until its first anniversary remained executory. At most appellant had acquired under the lease agreement a right in the nature of an option with a self-operating termination provision. Appellant having acquired no other rights or interest in the land there is nothing that the bankruptcy court could preserve for the creditors. *See Callaway v. Benton*, 336 U.S. 132, 141-43 (1949). There are no facts alleged to support the conclusion that payment of the delay rental is in the best interests of the creditors.

IV

Although appellant did not argue the point on appeal, the complaint alleges that the November 18 tender was within the sixty-day period allowed by the lease agreement for curing a "default". However, there is no merit to such claim. A provision allowing time to cure a "default" does not enlarge the time in which lessee must comply with the terms of the special limitation upon his interest. *Waggoner & Zeller Oil Co. v.*

Deike, supra; *Stephenson v. Calliham*, 289 S.W. 158 (Tex. Civ. App. 1926).

Finally, there is no merit to appellant's contention that section 70b of the Bankruptcy Act [11 U.S.C. § 110(b)] applies to the case here. Appellant did have the option to keep the lease agreement in force and effect by a timely payment of the delay rental. Had it made the payment the lease agreement would qualify as an executory contract under section 70b. *See Matter of Jackson Brewing Company*, 567 F.2d 618, 623 (5th Cir. 1978), and cases cited. However, the option no longer existed after November 8, 1975, and when appellant failed to pay the delay rental on or before that date, there was no contract, executory or otherwise, for the debtor to affirm or reject under section 70b. 8 Collier, *supra* ¶ 3.15[3].

Having disposed of appellant's contentions, the court has considered whether the case should be remanded to permit appellant to seek to amend the complaint, if possible. *See Ballou v. General Electric Company*, 393 F.2d 398 (1st Cir. 1968); *Sonus Corp v. Matsushita Electric Industrial Company, Ltd*, 61 F.R.D. 644, 650 (D. Mass. 1974). However, the present pleadings incorporating the lease agreement make an appropriate amendment virtually improbable.[6] *See O'Brien v. DeGrazia, supra* at 546 n.3. The appeal is dismissed.

FRANK J. MURRAY
Senior District Judge

Dated January 25, 1979

[6] It is clear that Good Hope could not allege that drilling operations have commenced, in light of its counsel's express and implied admissions that there has been no drilling. *See* Transcript of Bankruptcy Court Proceedings (May 14, 1976) p. 32. Brief for appellant on appeal, p. 4. It would obviously be futile to remand for the purpose of allowing Good Hope to amend its complaint to allege that drilling has taken place, or to remand to allow an amendment to allege facts that would excuse timely tender.

Appendix C.

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

IN THE MATTER OF:
GOOD HOPE REFINERIES, INC.,
Debtor
GOOD HOPE REFINERIES, INC.

CHAPTER XI PROCEEDINGS
No. 75-2741-G

VS.

BELIA R. BENAVIDES, FLUMENCIO MUNOZ, EDNA AMADA M. LOZANO, LUIS ANTONIO MUNOZ & OMAR ALBERTO MUNOZ

Order

Upon consideration of the Motion to Dismiss Complaint to Establish Rights Under Lease, it appearing to the Court that the Motion should be granted, and that this court has no jurisdiction or control of the asset involved, being an oil and gas lease that terminated by the terms thereof on November 8, 1975, it is by the Court this 9th day of June, 1976,

ORDERED, that the Complaint to Establish Rights Under Lease be, and the same is hereby, dismissed with prejudice; and

FURTHER ORDERED, that the Preliminary Injunction issued in this matter on April 8, 1976 be, and the same is hereby, dissolved and vacated.

PAUL W. GLENNON
Bankruptcy Judge

Appendix D.

BANKRUPTCY ACT, § 11(e), 11 U.S.C. § 29(e)

§ 29. [Suits By and Against Bankrupts.]

(e) A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

BANKRUPTCY ACT, § 70(a), 11 U.S.C. § 110(a).

§ 70. [Title to Property.]

(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided*, that in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records: (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt,

who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustees as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and

which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

BANKRUPTCY ACT, § 70(b), 11 U.S.C. § 110(b).

§ 70.

(b). The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same

at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforcible. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

Section 108 of the Bankruptcy Code of 1978
(11 U.S.C. § 108)

§ 108. Extension of time.

(a) If applicable law, an order entered in a proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable law, an order entered in a proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a

default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable law, an order entered in a proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
(2) 30 days after notice of the termination or expiration of the stay under section 362, 722, or 1301 of this title, as the case may be, with respect to such claim.

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-618.

GOOD HOPE REFINERIES, INC.,
PETITIONER,

v.

BELIA R. BENAVIDES, FLUMENCIO MUNOZ, EDNA AMADA M. LOZANO, LUIS ANTONIO MUNOZ, AND OMAR ALBERTO MUNOZ,
RESPONDENTS.

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Whether § 11(e) of the Bankruptcy Act provides Good Hope Refineries, Inc. (Refineries), an additional 60 days in which to pay delay rentals under the oil and gas lease in question.

Statutory Provisions Involved.

The only statutory provisions involved are § 11(e) of the Bankruptcy Act, 11 U.S.C. § 29(e), and §§ 402(a) and 403(a) of Title IV of the Bankruptcy Reform Act of 1978, 92 Stat. 2682 and 92 Stat. 2683, respectively, all of which are set forth in Appendix A, which follows page 9.

Statement of the Case.

The respondents (Benavides), wish to add the following facts to Refineries' statement of the case.

As consideration for Benavides' entering into the oil and gas lease with Refineries rather than with some other potential lessee, Refineries paid Benavides a bonus of $107,000. Under the terms of the oil and gas lease, Refineries had no obligation to drill or to pay delay rental. Only if Refineries wished to continue the lease for an additional one year in the original three-year term would Refineries either have to commence drilling or have to pay delay rental prior to the anniversary date. If Refineries did drill and produce minerals, then the term of the lease would extend until the minerals ceased to be produced in paying quantities.

On October 31, 1975, when Refineries filed its c. XI petition, the Bankruptcy Court entered an order which allowed and still allows Refineries to continue its business operations as debtor in possession.

In accordance with long-standing Texas oil and gas practice and law, Benavides declined the late delay rental.

The District Court held that there was nothing in the Bankruptcy Act to enable Refineries to cure its failure (not default) to pay the delay rental timely, and with good tender.

The First Circuit affirmed on the same grounds.

Argument.

The Court should deny the petition for a number of reasons.

First, the factual and legal situation of the case is probably unique. It is unlikely to occur again.

The primary statute at issue, the second sentence of § 11(e), hereinafter referred to as § 11(e), enacted in 1938, has been supplanted by § 108(b) of the Bankruptcy Code with respect to all bankruptcy cases filed on or after October 1, 1979.[1] Under the savings clause of the Bankruptcy Reform Act of 1978, § 11(e) will be controlling only in the ever-dwindling number of open bankruptcy cases filed before October 1, 1979.[2] Thus, § 108(b) is irrelevant to the case at hand.

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[1] Section 402(a) of Title IV of the Bankruptcy Reform Act of 1978, 92 Stat. 2682, provides:

> "Except as otherwise provided in this title, this Act shall take effect on October 1, 1979."

Section 401(a) of Title IV of the Bankruptcy Reform Act of 1978, 92 Stat. 2682, provides:

> "The Bankruptcy Act is repealed."

[2] Section 403(a) of Title IV of the Bankruptcy Reform Act of 1978, 92 Stat. 2682, provides:

> "A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted."

With reference to section 403(a), the Senate Report stated:

> "Subsection (a) makes it clear that the provisions of this act are not to affect cases commenced under prior law, which are to proceed, with

Combined with the phasing out of § 11(e) is the highly structured, sophisticated relationship between the parties as embodied in the oil and gas lease, a document that has evolved from a century of oil and gas production in Texas and has become formalized and defined through Texas case law.

The parties agree that Texas law applies to the issue of their relationship under the oil and gas lease and that these principles of law are well-settled.

Under these principles, the oil and gas lease is not a lease or a contract but rather the grant of a determinable fee in the subject mineral rights. The term "oil and gas lease" is a misnomer. In 7 *Texas Law Review*, 538 (1930), Professor A. W. Walker in a series of articles entitled, "The Nature of Property Interests Created by an Oil and Gas Lease in Texas," states, at pp. 553-554:

> "Since a determinable fee estate is nothing but a fee simple estate subject to one or more special limitations and has all the qualities of a fee simple estate so long as it endures the term 'lease' and the appellation of 'lessor' and 'lessee,' as well as the term 'assignment' and the appellations of 'assignor' and assignee,' as used in connection with the execution and conveyance of determinable fee estates in oil and gas are *misnomers* [emphasis supplied]. . . . Actually, under the decisions in this state, the so-called oil and gas 'lease' is a *conveyance* [emphasis in original] of the title to the minerals in place subject to certain special limitations which render, what would otherwise have been an absolute fee simple, a determinable fee."

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respect to both substantive and procedural matters, in the same fashion as though this act were not in effect."

Senate Report (Judiciary Committee) No. 95-989, 95th Cong., 2d Sess. 166, July 14, 1978.

In its petition, Refineries states that § 70(b) of the Bankruptcy Act is one of the statutes involved in this case. Without ever so stating, Refineries implies that the oil and gas lease is an executory contract. Under the well-established law of Texas, the oil and gas lease is the grant of a determinable fee.[3] A grant is not an executory contract. It is fundamental property law that ". . . a grant is a contract executed. . . ." *Fletcher* v. *Peck*, 6 Cranch 87, 137 (1810). Thus, § 70(b) of the Bankruptcy Act, like § 108(b) of the Bankruptcy Code, is irrelevant to this case.

It is well-settled Texas practice and Texas law that the payment of a delay rental under an oil and gas lease by check must be by a check that is in fact good. *Nelson Bunker Hunt Trust Estate* v. *Jarmon*, 345 S.W.2d 579, 581 (Tex. Civ. App. 1961). It is the common and prudent practice, if paying by personal check, to send the check 30 days before the anniversary date so that if the check is dishonored, there will be sufficient time to make the check good. Refineries took the calculated risk of not having sufficient time to make its check good when it tendered its personal check just 8 days before the anniversary date. Few people take such risks.

Second, this is not a case where the decision of the First Circuit is in variance with a decision of the Court or in conflict with other Circuit Courts of Appeals. Supreme Court Rule 19(b).

In the 40-year history of § 11(e), the Court has never interpreted the part of the statute in question. It appears that the Court has interpreted only the first sentence of § 11(e) and only upon two occasions. *Herget* v. *Central National Bank & Trust Co.*, 324 U.S. 4 (1945); and *Meyer* v. *Fleming*, 327 U.S.

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[3] *Texas Co.* v. *Daugherty*, 107 Tex. 226, 238 (1915). *Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 164 (1923). *Kaiser* v. *Love*, 163 Tex. 558, 560 (1962).

161 (1946). The only other time the Court appears to have referred to § 11(e) was in a footnote in *Williams* v. *Austrian*, 331 U.S. 642 (1947), where the statute was mentioned in a discussion concerning the definition of "proceeding." *Id.* at 658-659, n.42.

In the same 40 years, there appear to have been only two Circuit Court of Appeals cases dealing with the second sentence of § 11(e). In *Thomas J. Grosso Investment, Inc.* v. *Federal Savings & Loan Ins. Corp.*, 457 F.2d 168 (9th Cir. 1972), the Ninth Circuit was interpreting § 11(e) with respect to a factual situation completely unlike the case at hand. In *Schokbeton Industries, Inc.* v. *Schokbeton Products Corp.*, 466 F. 2d 171 (5th Cir. 1972), the Fifth Circuit dealt with a fact situation somewhat more similar to that of the case at hand. The First Circuit, in the decision below, followed the rationale of the Fifth Circuit.

Third, Refineries asserts in its petition that this statute, under which only two Circuit Court of Appeals cases have arisen in the course of 40 years, is "admittedly ambiguous."

The sentence is admittedly lengthy but, like all properly constructed and grammatically correct sentences, it consists of only a subject, verb, and object, each with modifying phrases. In essence, where either of two combinations of certain conditions has occurred, ". . . the receiver or trustee may . . . take any such action. . . ." The two combinations of conditions allowing the application of the statute are set forth at the beginning of the statute.

The Ninth Circuit in *Grosso Investment, supra*, dealt with one of the combinations of conditions:

> "'. . . where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action,

> filing any claim or pleading or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the . . . trustee . . . may take any such action. . . .'" *Id.* at 172.

The Fifth Circuit in *Schokbeton, supra*, dealt with the other combination of conditions:

> "'Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claims, proof of claim, proof of loss, demand, notice or the like, . . . and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee . . . may take any such action. . . .'" *Id.* at 176.

Obviously, this part of § 11(e) contemplates an existing claim of the debtor at the time of the filing of the petition but the facts of this case are such that no claim exists between the parties. Thus, § 11(e) does not apply to this case.

Furthermore, no court has found this language to be ambiguous.

Fourth, Refineries asserts in its petition a sweeping, startling, and novel interpretation of § 11(e) which does not seem to have appeared in any case or authority during the 40-year history of the statute. In essence, Refineries' interpretation of the statute is that it freezes the status-quo of the debtor's affairs for 60 days from the date of filing of the petition, during which time Refineries may do any act to further its interests.

As the only authority for this novel interpretation, Refineries cites the testimony of Mr. David Teitelbaum representing the Bankruptcy Committee of the New York Bar Association

during the hearings held before the House Judiciary Committee in June 1937 concerning revision of the Bankruptcy Act.[4]

Refineries does not cite any legislative reports or statements of committee or statements of legislators. This Court has stated,

> ". . . where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."[5]

Thus, there is no need to resort to the legislative history of § 11(e) since § 11(e) is clear and unambiguous.

Finally, those other reasons given as examples in Rule 19 of the matters considered by the Court in determining whether to exercise its discretion in granting a writ of certiorari have no application to this case.

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[4]Mr. Teitelbaum testified for three days before the committee. Refineries quotes from Mr. Teitelbaum's testimony on the first two days. On the third day, Mr. Teitelbaum was asked by the committee for his further comments on the proposed act. It is interesting to note that Mr. Teitelbaum prefixed his remarks as follows:

> "When I had the privilege of being heard by this Committee before, I spoke as the representative of the members of the bankruptcy committee of the association of the bar of the City of New York. My commission in that capacity was limited to the old Bankruptcy Act and *did not cover corporate reorganizations.*" (Emphasis supplied.)

Proposed Amendments to the Bankruptcy Act: Hearings on H.R. 6439 before the House of Representatives, Committee on the Judiciary, 75th Congress, 319, June 8, 1937.

[5]*United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269, 278 (1929).

Conclusion.

For these reasons, the petition for a writ of certiorari to the First Circuit Court of Appeals should be denied.

Respectfully submitted,

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Dated: November 14, 1979.

Appendix A.

BANKRUPTCY ACT, SECTION 11(e), 11 U.S.C. § 29(e).

e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

TITLE IV OF THE BANKRUPTCY REFORM ACT OF 1978,
PUB. L. 95-598 (92 STAT. 2682).

§ 401. (a) The Bankruptcy Act is repealed.

. . . . . .

§ 402. (a) Except as otherwise provided in this title, this Act shall take effect on October 1, 1979.

. . . . . .

(92 STAT. 2683.)

. . . . . .

§ 403. (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

. . . . . .